**BINAMIN MJC QUARRY SDN BHD**

**v.**

**WAY SOON CONSTRUCTION SDN BHD;
TRS BINA SDN BHD (GARNISHEE);
HONG LEONG FINANCE BHD (INTERVENER)**

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-784-1997]
29 MARCH 2001

***CIVIL PROCEDURE:*** *Attachment - Attachment of debts - Garnishee - Debts to be attached a retention sum under construction contract - Whether judgment creditor has a right to retention sum before it is due and payable*

The Senior Assistant Registrar ('SAR') made an order attaching all debts due or accruing from the garnishee ('TRS') to the judgment debtor ('Way Soon') to satisfy the judgment sum obtained by the judgment creditor ('Binamin') against Way Soon. The debt that was claimed by Binamin was a retention sum withheld by TRS under sub-contracts pertaining to construction works between TRS and Way Soon. TRS now appealed against the order of the SAR claiming that as the retention sum was not due and payable, Binamin had no right to it. Against this, Binamin cited two cases in support, *ie*, *Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd* and *Lee Kam Chun v. Syarikat Kukuh Maju Sdn Bhd.*

**Held:**

**[1]** Binamin should not, by garnishee proceedings, have a greater right to payment of the debt than Way Soon, who would not be entitled to claim payment of the debt before it became due and payable. The two cases relied upon by Binamin were decided on the basis that a retention sum was a debt payable in the future by reason of a present obligation. The retention sum herein was ordered to be presently paid to Binamin, thus giving Binamin a greater right to payment than Way Soon. That, with respect, could not be right.

**[2]** The retention sum was not a debt due or accruing from TRS to Way Soon. It was meant to be withheld by TRS pursuant to cl. 24.1(d) of the sub-contracts pending issuance of the certificate of practical completion

and finalisation of the account between the parties concerned. It was left to be seen how much of that sum, if any, would be available for payment to Way Soon at that stage. It followed therefore that no part of that sum should be ordered to be presently paid to Binamin.

*[Appeal allowed.]*

**Case(s) referred to:**
*Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd [1988] 2 CLJ 194* ***(not foll)***
*Lee Kam Chun v. Syarikat Kukuh Maju Sdn Bhd [1988] 1 MLJ 444* ***(not foll)***
*Webb v. Stenton (1882-1883) 11 QBD 518* ***(refd)***
*O'Driscoll & Anor v. Manchester Insurance Committee [1915] 3 KB 499* ***(refd)***
*Tapp v. Jones [1874-1875] L.R. 10 QB 591* ***(refd)***

**Legislation referred to:**
Rules of High Court 1980, O. 49 r. 1(1)

*For the judgment creditors - Basil Douglas Anthony; M/s Cheah Poh Gek & Assocs*
*For the garnishees - Devan Narayanam Raman; M/s Devan & Assocs*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Abdul Aziz Mohamad J:**

Under three subcontracts, the judgment debtors ("Way Soon") contracted to do certain construction works for the main contractors, TSR Bina Sdn Bhd ("TSR"), the garnishees. On 12 February 1998 the learned Senior Assistant Registrar, on the application of the judgment creditors ("Binamin"), made an order under O. 49 r. 1 attaching all debts due or accruing due from TSR to Way Soon to satisfy the judgment obtained by Binamin against Way Soon in this action, pending TSR's showing cause against the attachment. On 5 August 1998 the learned Senior Assistant Registrar found that TSR failed to show cause and made an order to that effect. TSR now appeal.

It appears from the written submissions in this appeal to be common ground that what Binamin have been claiming as debts due or accruing due from TSR to Way Soon is a retention sum of RM595,682.16 retained by TSR under and in accordance with the three subcontracts. According to O. 49 r. 1(1), TSR may be ordered to pay that sum to Binamin, or so much thereof as is sufficient to satisfy the judgment and the costs of the garnishee proceedings, if it is a "debt due or accruing due" from TSR to Way Soon. The judgment that Binamin obtained against Way Soon is for a sum of RM313,718.18 with

interest at 8% per annum on that sum from the date of judgment, 31 October 1997, until full settlement, besides ascertained interest of RM26,882.87 and costs of RM225.

TSR's stand is that the retention sum is not a debt due or accruing due to Way Soon. One reason for their stand is that Way Soon had, under a factoring agreement, sold to Hong Leong Finance Berhad ("Hong Leong") debts owed by TSR to Way Soon. That reason cannot stand because, in para. 9 of their affidavit dated 14 May 1998, Hong Leong themselves said that the retention sum was not part of the debts sold by Way Soon to them and they had no right to it.

The other reason for TSR's stand depends on cl. 24 of each of the subcontracts, which clause gave TSR the right to terminate the subcontracts on the happening of one of several events, one of which is in cl. 24.1(c), namely, the event of no major activities being carried out by Way Soon on the site for a continuous period of three days and Way Soon's failing to resume work within three days after receiving from TSR notice instructing them to do so.

Clause 24.1(d) provides that in the event the subcontract is terminated, "All amount due or to become due to (Way Soon) shall be withheld until the issuance of the certificate of practical completion and finalisation of the account which shall take into account all direct loss/or damage to (TSR) as a result of such termination and the additional cost in employing others to complete the works". The clause gives TSR the right to withhold moneys otherwise due to Way Soon until the final reckoning between them and TSR. The terms of the clause are clear. The right to withhold moneys in the event of breach of contract is given for the obvious reason that at the final reckoning there might not be anything due to Way Soon or what is due may not be as much as the amount withheld. Since there would be a right in TSR to withhold the moneys, before the final reckoning there would be no right in Way Soon to demand payment of them and if they were to sue for them they would not succeed.

On 13 February 1998, before the order of 12 February 1998 was served on TSR, TSR gave Way Soon notice of termination of the subcontracts under cl. 24.1(c) of the subcontracts. The notice not being complied with, on 31 March 1998 TSR terminated the subcontracts, which were worth RM11,913,643.10, but which Way Soon had performed only to the value of RM6,756,198.28.

TSR's stand is that the works have still not been completed and the architect has not issued a certificate of practical completion and the account between them and Way Soon has not been finalised. Therefore under cl. 24.1(d) they are entitled to withhold payment of the retention sum. They say that a large part of the works has not been completed and the cost of employing others to complete the works is very high and may exceed the retention sum, so that at the final reckoning, what with damages arising from the termination of the subcontracts, there might not be anything due to Way Soon. Since, under cl. 24.1(d), they are entitled to withhold it, the retention sum is not, for the purposes of O. 49 r. 1(1), a "debt due or accruing due" from them to Way Soon and therefore they ought not to be ordered under that order to pay the retention sum to Binamin. Their counsel argued that Binamin should not, by garnishee proceedings, be given a better right to payment of the retention sum than Way Soon.

Binamin's only answer to TSR's stand is to rely on two authorities. They are *Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd* [1988] 1 MLJ 434 and *Lee Kam Chun v. Syarikat Kukuh Maju Sdn Bhd* [1988] 1 MLJ 444. As is the present case, those two cases are also cases of garnishment of a retention sum in a construction contract. From their written submission, it is apparent that Binamin rely on those two cases for the ruling that a retention sum is a debt "accruing due" to the party who has done the work because, to them, the retention sum is, to adopt the words of Lindley LJ in *Webb v. Stenton* [1882-1883] 11 QBD 518, at p. 527, "a sum of money which ... will become payable in the future by reason of a present obligation, *debitum in presenti, solvendum infuturo*". In those two cases, the garnishee had the contractual right to draw upon or have recourse to the retention sum. In *Lee Kum Chun*, in which there was a breach of contract, it was to satisfy damages and loss suffered by the garnishee from the breach of contract (see p. 448 G-H) In *Kedah Kelang Papan*, in which there was no breach of contract, it was for compensating the garnishee for defects in the works carried out (see p. 435 I right). Even so, the garnishees failed in their appeals against the garnishee order absolute. That means they had to pay up the retention sum to the judgment creditor, thereby losing the benefit that the retention sum was intended to bring.

With respect, I am not inclined to follow the decision in the two cases as to the nature of a retention sum because its effect is to defeat the purpose of a retention sum. It would be a different matter – and I say this merely to illustrate what I would feel would not be objectionable, and not by way of opining that it would be possible procedurally – it would be a different matter if the two cases were cases in which the garnishee was ordered to pay to the

judgment creditor, when the time came, the retention sum or whatever may be left of it after the garnishee had ceased to have his right of recourse to it or had exercised his right of recourse to it, as the case may be, and if in this case that were the type of order that Binamin sought. But in this case, as in the two cases, Binamin the judgment creditors are seeking a present payment up of the retention sum in disregard of TSR the garnishees' contractual right of recourse to it.

In those two cases, the decision that the retention sum was a sum of money payable in the future by reason of a present obligation was made after considering English authorities which did not concern a retention sum. For example, in *O'Driscoll & Anor v. Manchester Insurance Committee* [1915] 3 KB 499, which was considered in both the cases, the sum of money concerned appears, from the facts as set out in *Kedah Kelang Papan*, a panel doctor's share in a pool of funds received by an insurance committee from the National Insurance Commission for distribution among panel doctors for work done under their agreements with the insurance committee. It was held that where a panel doctor had done work under his agreement, there was a debt owing or accruing from the insurance committee to the panel doctor notwithstanding that the exact share payable to him from the pool of funds might not have yet been ascertained. In that case it is clear that the panel doctor had a share in the pool of funds, which share was not subject to the insurance committee's or any other person's right of recourse.

*Tapp v. Jones* [1874-1875] LR 10 QB 591, which was considered only in *Kedah Kelang Papan*, I think provides a good and clear example of a sum of money that will be payable in the future by reason of a present obligation. In that case the garnishee had an agreement with the judgment debtor under which the garnishee was bound to pay a sum of money to the judgment debtor by monthly instalments of pound sterling 10 each. It was a clear case of the garnishee being under a present obligation to pay pound sterling 10 per month to the judgment debtor in the future. The question was whether an order could be made directing the garnishee to pay future instalments as they became due. Blackburn J said at p. 593:

> I have come to the conclusion that the true construction is that there is power to make an order against the garnishee for payment of his debts as and when they become payable, instead of making a fresh order as it falls due.

It is important to note from that statement that because the debts were payable in the future, the garnishee was ordered to pay them to the judgment creditor only when they would fall due, and not immediately.

It stands to reason that it should be so, because the judgment creditor should not, by garnishee proceedings, have a greater right to payment of the debt than the judgment debtor, who would not be entitled to claim payment of the debt before it becomes due. Now the two cases relied upon by Binamin were decided on the basis that a retention sum is a debt payable in the future by reason of a present obligation, and yet the sums concerned were ordered to be presently paid to the judgment creditors, thus giving the judgment creditors a greater right to payment than the parties from whom the garnishees withheld the retention sums. That, with respect, cannot be right.

In *Kedah Kelang Papan*, at p. 438 C-G left, Lim Beng Choon J recognised the garnishee's contractual right to draw upon the retention sum to rectify defects in the work carried out by the judgment debtor but he disregarded it, apparently for two reasons. Firstly, he said this:

> But in garnishee proceedings the law would only acknowledge two kinds of debts, an existing debt payable in presenti or an existing debt payable in futuro. The law does not recognise a debt that probably will arise in the future or however likely it may arise.

It would seem as though he felt that the retention sum belonged to the third kind of debts – for, if otherwise, why the mention of the third kind? – and since it was not acknowledged by law in garnishee proceedings it must be fitted into one of the other two kinds, which he did into the kind of debts that are "payable in futuro". To say that the law would "acknowledge" only two kinds of debt in garnishee proceedings is apt to create a wrong impression. I think what is meant is simply that only the first two kinds of debt can be garnished. That being so, I should have thought that if a debt were of any other kind, then it simply cannot be garnished.

Secondly, the learned judge, after recognising the garnishee's right to draw upon the retention sum, spoke of that right as a right of making a cross-claim against the judgment debtor, and he then cited *Tapp v. Jones*, *supra*, for the proposition that the law in garnishee proceedings is not concerned with cross-claims not existing at the date of the attachment, there being none existing in *Kedah Kelang Papan* at that date.

As has been seen, in *Tapp v. Jones* the instalments due to the judgment debtor were not subject to any contractual right of direct recourse by the garnishee for any purpose. It was only suggested that a right of set-off might accrue to the garnishee as against the judgment debtor between the date of the attachment and the date when the debt would become payable. It is not clear on what basis a right of set-off might arise. Blackburn J held at p. 593:

> On the attachment the thing is absolutely fixed; and there is no clause of mutual credit or set-off.

In *Kedah Kelang Papan*, however, as in the present case, the garnishee's right is not a right of set-off. In that case it was a right, contractually given, of directly drawing on the fund to rectify defects. In the present case, it is in effect a similar right given to make good the losses incurred as a result of termination of contract. In the present case, as in that case, the right was a charge on the retention sum right at the outset and existed at the time of attachment and it was given so that TSR did not have to chase after Way Soon to recover their losses to the extent of the retention sum. The right, in my opinion, cannot be nullified by attachment.

In *Kedah Kelang Papan*, Lim Beng Choon J also took the view that the retention sum in question had been earned by the judgment debtor and belonged to him because he had done the work. With respect, I should have thought that even though the judgment debtor had done the work, he would have earned the retention sum only when, at the end of the retention period, his work had been shown to be devoid of defects or he had rectified any defects that may have been discovered.

To conclude, the retention sum in this case is not a debt due or accruing due from TSR to Way Soon. It is meant to be withheld by TSR pursuant to cl. 24.1(d) of the subcontracts pending issuance of the certificate of practical completion and finalisation of the account. It is left to be seen how much of that sum, if any, would be available for payment to Way Soon at that stage. There might even not be anything left in favour of Way Soon. No part of that sum may be ordered to be presently paid to Binamin, as is their desire in the garnishee proceedings.

I allow the appeal and set aside the finding of the Senior Assistant Registrar that TSR, the garnishees, had failed to show cause. I order that the costs of this appeal and of the show-cause proceedings before the Senior Assistant Registrar be borne by Binamin, the judgment creditors.